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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

SOCIEDAD CIVIL AGRÍCOLA e INDUSTRIAL SUCESIÓN J. SERRALLÉS,
Petitioner,

v.

COMMONWEALTH OF PUERTO RICO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-

SOCIEDAD CIVIL AGRÍCOLA e INDUSTRIAL
SUCESIÓN J. SERRALLÉS,
Petitioner,

v.

COMMONWEALTH OF PUERTO RICO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

Sociedad Civil Agrícola e Industrial, Sucesión J. Serrallés hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Puerto Rico entered on November 12, 1975, which affirmed a decision of the Superior Court, Court of Eminent Domain, of Puerto Rico.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Puerto Rico (App. 1a) is not reported. The initial opinion of the Superior Court, Court of Eminent Domain (App. ——) and the order of the trial court denying

the motion seeking relief from judgment (App. ——) are not reported.*

JURISDICTION

The decision of the Supreme Court of Puerto Rico was announced on November 12, 1975 (App. 1a), and judgment was entered on the same date. (App. 8a.) A timely motion for reconsideration was filed on December 1, 1975, and this motion was denied on December 17, 1975. (App. 9a.) An application for an extension of time in which to file a petition for writ of certiorari was filed on March 3, 1976, and on March 5, 1976, Mr. Justice Brennan extended the time for filing the petition to May 15, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. 1258(3).

QUESTIONS PRESENTED

In a condemnation proceeding, it was held that the judgment terminating a prior condemnation proceeding, which did not mention or concern land condemned in the instant proceeding, was res judicata to the effect that the prior condemnation placed building restrictions on the land condemned in the instant proceeding because the owner should have known at the time of the first condemnation that its remaining land became subject to "tacit building restrictions" as a result of the first condemnation despite the absence of any law or regulation restricting improvements on this property.

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* The opinion and order of the trial court are available only in Spanish. As of the date of filing of this Petition, the clerk of the trial court has not yet been able to produce certified English translations of those documents, as requested by the Petitioner. Copies of the originals of those documents, in Spanish, are submitted with this Petition, and printed copies of the official English translations will be submitted when they are available. At that time appropriate page references to the Appendices will also be provided.

In this situation, the questions presented are:

1. Whether, in affirming the holding on res judicata, the judgment of the Supreme Court of Puerto Rico violates the Due Process Clause of the Fifth and Fourteenth Amendments by unfairly depriving the owner of that land of a chance to assert his rights to just compensation for the building restriction and results in a taking of private property for public use without just compensation in violation of these Amendments.

2. Whether, in holding that the Puerto Rican Planning Board had the power to impose "tacit restrictions" prohibiting the construction of any building on certain land, the judgment of the Supreme Court of Puerto Rico has allowed property to be taken for a public use without just compensation in violation of the Fifth and Fourteenth Amendments.

3. Whether, in affirming the holdings on res judicata and "tacit restrictions," the judgment of the Supreme Court of Puerto Rico has sustained an action by the Commonwealth of Puerto Rico impairing the obligations of a lease contract between the owner of the land condemned and the Commonwealth of Puerto Rico in violation of Section 10 of Article I of the United States Constitution, or of the Due Process Clauses of the Fifth and Fourteenth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 10 of Article I of the United States Constitution provides, in part:

> No state shall . . . pass any . . . Law impairing the Obligation of Contracts, . . .

The Fifth Amendment of the United States Constitution provides, in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment of the United States Constitution provides, in part:

> nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT

This case arises out of a condemnation proceeding commenced by the Commonwealth of Puerto Rico (hereinafter referred to as the "Commonwealth") in which the defendant land-owner, the Sociedad Civil Agrícola e Industrial, Sucesión J. Serrallés (hereinafter referred to as "Sucesión"), challenges the valuation given to a portion of the land taken. The constitutional issues raised by this case, which began in 1968, have their roots in a previous condemnation proceeding which originated in 1963.

A. The 1963 Condemnation

In 1954, the Sucesión leased to the Commonwealth, as represented by the Puerto Rican Transportation Authority ("PRTA"), a tract of about 27 acres outside the city limits of Ponce, Puerto Rico, which contained a paved landing strip. (On the Plan in Annex II, following page 28, *infra*, this area is indicated by the central, white area.) The purpose of the lease was to enable the PRTA to operate the landing strip, known as the Mercedita Airport, as a commercial airport. The lease contract provided that in the event the Commonwealth desired to condemn additional adjacent lands for airport purposes, it pay compensation for the land at its then current market value.[1]

[1] Clause Four of the contract stated in pertinent part:

> Any additional land that may be required by the "lessee" or by the Commonwealth if condemned by eminent domain proceedings or otherwise shall be compensated for at its then value, unless an agreement as to such value at such time is arrived at between the parties.

On December 27, 1963, the Commonwealth instituted condemnation proceedings in the Superior Court, Court of Eminent Domain, by which it acquired title in fee simple to the area it had leased and to additional surrounding land owned by the Sucesión. (The additional land taken in 1963 is represented by the green area on the Plan in Annex II, following page 28, *infra*.) The 1963 case was concluded by a judgment approving a stipulation of the parties arrived at in open court, which determined that, taking into account the best use of the condemned land, compensation should be paid to the Sucesión at the rate of approximately $6,000 per "cuerda".[2] The judgment stated that the contractual obligation to consider the best available use of the property condemned constituted the "law of the case."[3]

No claim was made by the Commonwealth for any reduction in value because of any building restrictions or easement of avigation resulting from the prior lease, nor did the Commonwealth claim, nor did the trial court make any allowance for, any building restrictions or easements of avigation over lands other than those taken in 1963. It will be noted from the Plan that no land was taken in 1963 at the west end of the runway.

The judgment terminating the 1963 proceeding was issued on March 4, 1966, and no appeal was taken. However, motions to clarify the judgment were filed, and on March 21, 1966, the court issued an amendment "nunc

[2] A "cuerda" is a measure of land employed in Puerto Rico. It is less than one percent smaller than an acre, being equivalent to 43,290 square feet, or 270 square feet less than an acre.

[3] Judgment of the Superior Court, Court of Eminent Domain, No. E-63-1794 (March 4, 1966). [Translations herein, except for official translations in the Appendices of opinions below, are by the Sucesión.]

pro tunc" specifying that the Sucesión conserved its rights of ingress and egress toward the landing strip from the hangers belonging to the Sucesión and situated on land along part of one side of the landing strip but which had not been taken in the 1963 condemnation. On July 5, 1966, the court issued another amendment "nunc pro tunc" specifying that the agreement reached between the parties included an obligation on the part of the Sucesión to "maintain on both sides of the landing strip zones free from obstructions to aerial navigation in conformance with existing or future rules and regulations which the Federal Aviation Agency may promulgate."[4] It should be noted that the amendment refers to the sides ("lados") of the landing strip, and not to the ends ("extremos"), and this was confirmed by the trial judge, as indicated in the next paragraph below.

B. The 1968 Condemnation: Trial Stage

On October 17, 1968, the Commonwealth initiated a new condemnation proceeding in the Superior Court, Court of Eminent Domain, with respect to 158.3973 cuerdas of the Sucesión's land adjacent to the expanded Mercedita Airport. (This land is indicated in orange on the Plan in Annex II, following page 28, *infra*.) A portion of this land nearest to the landing strip, 82.21 cuerdas, lay within the "approach" or "clear" zones associated with the ends of the runway and the "transition" zones associated with the sides of the runway, as defined by the Federal Aviation Administration ("FAA").[5] In the course of the proceedings, an attorney for the Commonwealth contended that the stipulation terminating the

[4] Order of the Superior Court, Court of Eminent Domain, Amending Nunc Pro Tunc Its Judgment of March 4, 1966, in Case No. E-63-1794 (June 5, 1966).

[5] For an explanation of these terms, see Annex I, *infra* at 28. The FAA regulations do not prohibit private landowners from constructing buildings within these zones.

1963 proceeding had included an understanding concerning restrictions on building within the approach or clear zones, despite the fact that this understanding was not reflected in the judgment or in either of the "nunc pro tunc" amendments to the judgment. The trial judge, who had also presided in the 1963 proceeding, responded on the record that "[n]othing was said concerning the ends; nothing was said about the 'clear zone'; nor was there anything that bound or obligated [the Sucesión] not to give this property its best use."[6] The judge also asked counsel for the Commonwealth why the Commonwealth did not seek a reconsideration of the final judgment or appeal the judgment, and why the Commonwealth entered into amendments nunc pro tunc, if the Commonwealth believed that the stipulation terminating the 1963 proceeding resulted in restrictions on the Sucesión's land which was not taken.[7] Furthermore, the court stated that "[i]f rights of ownership [of land adjacent to the Mercedita Airport] are restricted in order to comply with these requirements [imposed by the FAA as a condition to granting federal aid], it is necessary to pay just compensation to the owners at the market value which prevails at the date of the condemnation."[8]

At the conclusion of the presentation of evidence, the court informed counsel that it did not require briefs because it was sufficiently familiar with the subject matter. Despite the above-mentioned statements during the proceedings, however, the court stated in its opinion issued on October 15, 1971:

> "As a question of fact we conclude . . . that in the area occupied by the clear zone no construction of any class is permitted in Puerto Rico; and that

[6] Record of Hearing on September 23, 1970, vol. 2 at 88.

[7] *Id.* at 86-87.

[8] Record of Hearing on October 15, 1970, vol. 9 at 17.

> in the transition area and up to the end of the building construction line only the construction of certain buildings which are directly related to the operation of aerial navigation is permitted, and part of that area may be used for parking lots." [9]

Therefore, although the court considered the rest of the Sucesión's land taken in this condemnation to be suitable for light industrial development and hence worth $12,000 per cuerda, the court held 82.21 cuerdas to be suitable essentially for agricultural use only. Thus, solely because of supposed building restrictions, the court assigned this land a value of only $3,000 per cuerda, thereby reducing the award to the Sucesión by a total of $739,890.00.

In its conclusions of law, the trial court did not assert that any federal or local regulations prohibited construction within the approach and transition zones.[10] Instead, the court supported its conclusion of "fact" with two legal theories: (1) res judicata, and (2) tacit zoning.

The court held that the evidence showed that it was the policy of the Port Authority, the successor to the PRTA, to take advantage of federal aid administered by the FAA, and that the FAA had a policy, set forth in an airport design manual, of denying federal aid to finance airport projects where the local agency in charge of the airport could not guarantee that there would be no construction in the approach zones and construction only of certain buildings connected with aerial navigation operations in the transition zones. The court held that it had to presume that the Sucesión knew or could have known about this policy, which the Planning Board would implement by denying building permits to build on land in these zones. The court thus in effect charged the Sucesión with constructive knowledge prior to the

[9] Trial Court Opinion, Conclusion of Fact IV-A (App.)

[10] *Id.*, Conclusions of Law 5-7 (App.).

1966 judgment that its land had been tacitly zoned despite the absence of any regulations to that effect, and because the Sucesión had not claimed compensation for this building restriction on lands not condemned in the 1963 proceeding, the court held that the 1966 judgment constituted res judicata.[11]

C. Initiation Of Appeal

On November 18, 1971, the Sucesión initiated an appeal to the Puerto Rico Supreme Court by filing a Notice of Appeal in the trial court. The Notice contended that the trial court judgment (1) "deprived the [Sucesión] of its property without due process of law, in contravention of the Fifth Amendment of the Constitution of the United States of America," [12] and (2) "decreed a taking of private property for public use without just compensation, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States. . . ." [13] The Notice based these contentions in part on challenges to the trial court's conclusions both on res judicata [14] and on tacit zoning.[15]

The Commonwealth filed a Motion to Dismiss on December 22, 1971. On January 3, 1972, the Sucesión filed an "Answer to the Motion to Dismiss Filed by the Plain-

[11] *Id.*, Conclusions of Law 6-9 (App.).

[12] Notice of Appeal of Sociedad Civil Agrícola e Industrial, Sucesión J. Serrallés, et al. at 1.

[13] *Id.* at 2.

[14] *Id.* at 3 ("The trial court erroneously concluded that land of the defendant not condemned in a previous condemnation was affected and limited in its use, to the point of being unusable for its best exploitation and use, by reason of supposed regulations not in existence or invalid . . . .").

[15] *Id.* at 3 ("The trial court . . . concluded . . . that in fact the Planning Board of Puerto Rico established regulations which had the effect of depriving the [Sucesión] of the best uses to which its property could be dedicated, without just compensation.").

tiff-Appellee, Dated December 22, 1971." As a "constitutional question" the Answer raised the issue of "the taking of private property for public use without a previous condemnation and consequent compensation for its best use." [16] The Answer argued on the basis of *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), that the first time legal restrictions were placed on construction within the 82.21 cuerdas was in the present case, so that the 1963 proceeding could not be res judicata on this issue.[17] In its discussion of this constitutional issue, the Answer also maintained that "no law or regulation prohibit[s] any class of construction in the area of 82.21 cuerdas . . . ," [18] and argued that any zoning, tacit or otherwise, having the effect for which the trial court contended would take property without just compensation.[19]

On February 2, 1972, the Supreme Court of Puerto Rico denied the appeal, even considering it as a petition for review.[20] On February 14, 1972, the Sucesión filed a

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[16] Answer of Defendant-Appellant to the Motion to Dismiss Filed by the Plaintiff-Appellee, Dated December 22, 1971 at 5.

[17] *Id.* at 14 ("What is certain is that the [Commonwealth] in the first condemnation, in 1963, to which [Trial Court Opinion,] Conclusion [of Law] 8 [(App.)] refers, as in the cited case of *Griggs* v. *Allegheny* [*County*, 369 U.S. 84 (1962)], did not take sufficient land to include the easement of avigation [building restrictions] over adjacent land in private hands. This was done in the condemnation which is the object of the present case filed in October of 1968.").

[18] *Id.* at 28.

[19] *Id.* at 10 (citing Annot., 77 A.L.R.2d 1355, 1362-63 (1961), to the effect that "a zoning law that practically prohibited the building of any structure on land within 100 feet from the perimeter of an airport amounted to a confiscation, and neither the state nor the city can, through the guise of a zoning law or ordinance, confiscate the property of an individual . . . .").

[20] The distinction between an appeal to the Supreme Court of Puerto Rico and a petition for review is similar to the distinction between appeals and petitions for a writ of certiorari to this Court. *See* 4 P.R.L.A. § 37 (1965), *as amended*, 4 P.R.L.A. § 37(a), (d) (Supp. 1974).

"Motion Seeking Reconsideration of the Order Denying the Appeal." The Motion pressed the existence of the constitutional question of just compensation as grounds for the reconsideration.[21] The Motion also argued that it was proper to raise constitutional questions for the first time on appeal to the Puerto Rico Supreme Court because they could not have been anticipated during the trial.[22]

D. Motion For Relief From Judgment

Subsequent to the trial court's decision, the Sucesión learned through a Freedom of Information Act inquiry that federal funds had been neither requested nor granted for the 1963 expansion of the Mercedita Airport. The Sucesión thereupon filed motions in both the trial court and the Supreme Court of Puerto Rico, on April 12 and 13, 1972, respectively, seeking to set aside the judgment of the trial court on the basis that the erroneous assumption that federal funds had been sought in the 1963 expansion prejudicially influenced the courts' conclusions on res judicata and tacit zoning.[23] In its "Memorandum in Support of the Motion to Relieve the Defendant of Certain Determinations and Conclusions" filed on August

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[21] Motion Seeking Reconsideration of the Order Denying the Appeal at 2 ("The appeal should proceed because in it a right or immunity under the Constitution of the United States . . . is claimed."). *See also id.* at 4 (The Sucesión asserted it would demonstrate in a hearing that "first, no regulations [prohibiting all construction on the 82.21 cuerdas at issue] exist, and second, that if they did exist, they would be invalid as constituting a taking of property for a public use without due compensation for its best use, . . .").

[22] *Id.* at 16 ("The principle to which we refer which permits the pleading of constitutional questions when they could not be anticipated during the trial, is expressed in *Missouri ex rel.* [*Missouri Co.*] v. *Gehner*, [281 U.S. 313 (1930)]; and *Brinkerhoff-Faris* [*Trust & Savings Co.*] v. *Hill*, [281 U.S. 673 (1930)].").

[23] The motions were filed under Rule 49.2 of the Puerto Rico Rules of Civil Procedure, which is substantially the same as Rule 60(b) of the Federal Rules of Civil Procedure.

29, 1972, the Sucesión pressed its constitutional arguments before the trial court as additional arguments for relieving it of the effects of the 1971 judgment. In particular, the Memorandum repeated the argument based on *Griggs* v. *Allegheny County, supra*, against res judicata,[24] argued to show that the taking of an easement of avigation for public use is beyond the police powers of a state and can only be accomplished through eminent domain proceedings and payment of just compensation,[25] and argued that *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U.S. 673 (1930), and *Missouri ex rel. Missouri Company* v. *Gehner*, 281 U.S. 313 (1930), permit the raising of constitutional issues after the first trial court opinion because they could not have been anticipated during trial.[26]

In response to that motion, the Trial Court modified its judgment by deleting the portions that referred to use of federal funds in 1963, but refused to change its conclusions concerning res judicata and tacit zoning, supporting them this time by holding that in 1963 the Commonwealth had succeeded to all rights the Sucesión had formerly held in the lands condemned in that year and that because the free and transition zones "are indispensable and inherent parts of a landing field for planes," [27] the Commonwealth therefore necessarily "acquired an abso-

[24] Memorandum in Support of the Motion to Relieve the Defendant of Certain Determinations and Conclusions at 23, 35.

[25] *Id.* at 52-54. The Sucesión quoted from Ackerman v. Port of Seattle, 55 Wash. 2d 400, 408-09, 348 P.2d 664, 669 (1960), which in turn quoted Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922), to the effect that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. . . ."

[26] *Id.* at 42.

[27] Order of the Trial Court of January 5, 1973, Point 2 (App.).

lute right" [28] to whatever building restrictions applicable law imposed within such zones. Furthermore, although the Planning Board had never exercised its authority to declare the area around the Mercedita Airport an airport zone, the Court held that the approval by the Planning Board of the lease contract in 1954 "is equivalent to a tacit declaration" [29] that the area around the Mercedita Airport constituted an airport zone, subject to building limitations imposed by laws governing airport zones. The court supported its finding that the Planning Board had approved the lease contract by the observation that the lease contract was by its terms subject to the approval of the Planning Board, and that subsequent to entering into the lease, the Port Authority in fact operated the Mercedita Airport as a lessee.[30]

E. Completion Of Appeal To Puerto Rico Supreme Court

On March 13, 1973 the Supreme Court of Puerto Rico issued an order reconsidering its order of February 2, 1972, and ordering that the petition for revision be heard. The Sucesión filed in the Supreme Court a "Brief of the Defendant-Appellant Sucesión J. Serrallés" on April 17, 1973, in which it assigned as error in the proceedings below the fact that the court failed to enforce the terms of the lease contract.[31] The Brief referred to the constitutional protection against impairment of contract by arguing that the doctrine of sovereign immunity should not

[28] *Id.* (App.).

[29] *Id.*, Point 2(d) (App.).

[30] *Id.* n.9 (App.).

[31] Brief of the Defendant-Appellant Sucesión J. Serrallés at 6, 8 (The trial court "did not apply the law of the lease contract which expressly governed the method of valuing lands of the defendant-appellant which might be condemned in the future. That is, they were to be valued at their best use, while the trial court gave to the 82.21 cuerdas of condemned land only an incremented agricultural valuation.").

shield the Commonwealth from liability for failing to adhere to the terms of its lease contract with the Sucesión because "as it is well known, the doctrine of sovereign immunity, and the shield which this sovereignty offers to the central government, disappears when said government steps down from its sovereign pedestal in order to make formal contracts with its citizens." [32]

The Sucesión also challenged the trial court's application of the doctrine of res judicata, on the grounds that the trial court's decision deprived the Sucesión of a hearing on its rights concerning land in the approach and transition zones.[33] That this claim was based on federal constitutional law was made clear by references to *Griggs* v. *Allegheny County*, *supra*.[34] Similarly, the Sucesión raised the point in its brief that if adjacent property is affected by the operation of an airport, it is necessary to compensate the taking, and its reference to decisions of this Court makes clear that this claim is also grounded in federal constitutional law.[35]

The Supreme Court of Puerto Rico issued its judgment and a per curiam opinion affirming the judgment of the trial court on November 12, 1975. The Puerto Rico

[32] *Id.* at 12.

[33] *Id.* at 21 (The trial court erred "because [the trial court] has determined that the omission of the defendant-appellant [to raise the issue of compensation for the building restrictions] in 1963 made that judgment res judicata, preventing it from claiming its rights in 1968, when in fact it was in 1968 that the land subject to this litigation was condemned.").

[34] *Id.* at 23 ("we believe that the defendant had the right to trust . . . in the law laid down in *Griggs* v. *Allegheny* [*County*, 369 U.S. 84 (1962)], and the cases there cited, to the effect that the Authority 'did not take enough land' in 1963, as indeed it did in 1968 when in fact it solicited and obtained federal money" for the first time.).

[35] *Id.* at 33 ("precedents establish that if adjacent private land is affected it is necessary to compensate it. *See U.S.* v. *Causby*, [328 U.S. 256 (1946)], . . .").

Supreme Court dismissed the contention that the trial court's judgment failed to observe the contractual obligations of the Commonwealth to the Sucesión under the lease agreement on the grounds that the trial court had properly determined the best use of land within the approach and transition zones,[36] thus in effect ignoring the question which the Sucesión had raised under the Obligation of Contracts Clause.

The Supreme Court of Puerto Rico then dismissed as "frivolous" the Sucesión's constitutional contentions with respect to the two doctrines upon which the trial court relied in determining that the Sucesión's land within the approach and transition zones had a highest and best use as agricultural land. With respect to the allegation that tacit zoning of the Mercedita Airport deprived the Sucesión of property without just compensation the court said that

> [t]he fact that the federal regulations establish height limitations does not exclude the Planning Board's power to grant or deny construction permits in airport zones. And the fact that an express zoning of Mercedita Airport was not made does not bar the acknowledgement of restrictions for the benefit of public security.[37]

With respect to the issue of res judicata, the Puerto Rico Supreme Court stated that the lower court's decision "is correct" because "[a] final and unappealable judgment as that of the case of 1963, constitutes res judicata not only in relation to the questions raised, but also in relation to those which could have been raised." [38]

On December 2, 1975, the Sucesión filed a timely "Motion for Reconsideration of Opinion Per Curiam of

[36] Opinion of Puerto Rico Supreme Court at 6-7 (App. 5a-6a).

[37] *Id.* at 7 (App. 6a-7a).

[38] *Id.* (App. 7a).

November 12, 1975," in which it argued that the decision below and its affirmance by the Puerto Rico Supreme Court placed in issue the "constitutional pleading of impairment of obligations of contracts." [39] In its discussion of *Griggs* v. *Allegheny County*, *supra*, the Sucesión argued again that the holding on res judicata deprived it of property without just compensation in violation of the constitutional mandate.[40]

By order of December 17, 1975, the Supreme Court of Puerto Rico denied the Motion for Reconsideration without opinion.[41]

REASONS FOR GRANTING THE WRIT

In sustaining the trial court's ruling that 82.21 cuerdas of the Sucesión's property must be valued as if subject to a building prohibition preventing industrial development of that property, the decision of the Supreme Court of Puerto Rico patently disregards federal constitutional principles enunciated by this Court. The Sucesión has persistently and diligently asserted those constitutional principles at both levels of the Puerto Rican judicial system from the moment it became apparent that constitutional principles were at stake. The Puerto Rico Supreme Court was thus clearly presented with the constitutional claims. The application of res judicata in this situation, without a shred of evidence that the 1963 proceeding involved the imposition of building restrictions on land within the approach zones of

[39] Motion for Reconsideration of Opinion Per Curiam of November 12, 1975 at 2.

[40] *Id.* at 9-10 ("In the case of *Griggs* v. *Allegheny County*, [369 U.S. 84 (1962)], the precise point was pleaded which is involved in the present case. It may be said without vacillation that said case describes accurately that which occurred in the present case . . . .").

[41] App. 9a.

the Mercedita Airport runway, and indeed, in the face of the unequivocal statement of the trial judge during the 1968 proceeding that the 1963 proceeding did not concern in any way the land at the ends of the runway, is so wholly unsupportable that it works a denial of constitutional rights.[42]

This Court should grant review of this case in order to ensure that constitutional guarantees have the same meaning in Puerto Rico that they have in other areas of our nation. Moreover, the importance of the issues involved reaches far beyond the parties to this suit, and the issues are crisply presented in this instance, untrammelled by murky factual disputes or details of Puerto Rican law. For all of these reasons, amplified below, the Court should grant this petition for certiorari.

(1) The Decision Of The Supreme Court Of Puerto Rico Conflicts With This Court's Decision In *Griggs* v. *Allegheny County*

The decision of the Supreme Court of Puerto Rico conflicts directly with the holding of this Court in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962).[43] In that case,

[42] This Court has long held that "[i]t . . . is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support." Ward v. Love County, 253 U.S. 17, 22 (1920). *See also* Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945); Fiske v. Kansas, 274 U.S. 380 (1927).

[43] The decision of the Puerto Rico Supreme Court also conflicts with the numerous state courts that have followed *Griggs* by sustaining "inverse condemnation" suits by owners of property adjacent to airports, whose full use and enjoyment of the property are substantially impaired by reason of the airport. *See, e.g.*, Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), *cert. denied*, 419 U.S. 1122 (1975); Alevizos v. Metropolitan Airports Commn. of Minneapolis and St. Paul, 298 Minn. 471, 216 N.W.2d 651 (1974); State *ex rel.* Bower v. City of Columbus, 27

this Court reversed the holding of the Supreme Court of Pennsylvania that an airport operator with the power of eminent domain need not pay just compensation to persons owning land in the approach zones of airport runways when, in accordance with federal regulations, it requires airplanes approaching the runways to fly so close to the ground that the landowners' use and enjoyment of their property is substantially impaired. In so deciding, this Court stated (369 U.S. at 90):

> The glide path for the northeast runway is as necessary for the operation of the airport as a surface right of way for operation of a bridge, or as is the land for the operation of a dam. *See United States* v. *Virginia Electric Co.*, 365 U.S. 624, 630. As stated by the Supreme Court of Washington in *Ackerman* v. *Port of Seattle*, 55 Wash. 2d 401, 413, 348 P.2d 664, 671, ". . . an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed. . . ." Without the "approach areas," an airport is indeed not operable. Respondent [the airport operator] in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.

In this case it is equally clear that by constitutional standards the respondent airport operator, in effect the Commonwealth, did not acquire enough in the 1963 condemnation to support its claims for the valuation of the 82.21 cuerdas taken in the 1968 proceeding. Neither party argues that there has been a taking of an avigation easement through overflights, but the effect of the decision of the Puerto Rico Supreme Court is to enable the Commonwealth to obtain without cost an absolute

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Ohio St. 2d 7, 271 N.E.2d 860 (1971), *cert. denied*, 405 U.S. 917 (1972); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965).

prohibition on any and all building on the land within the approach zones. The trial court valued this prohibition at $9,000 per cuerda. Quite plainly, had the airport operator in *Griggs* taken the petitioners' land in eminent domain proceedings rather than by causing overflights, the holding in *Griggs* would have required the airport operator to pay for the easement of avigation over that land as well as for the other components of the full market value of the land. In *Griggs* this Court prevented a state court from enabling a municipal airport operator to avoid costs the Constitution imposes on airport use; the Court should grant review in this case to ensure that municipal airport operators in the Commonwealth also bear the full burden the Constitution imposes on them.

(2) The Puerto Rico Supreme Court's Holding On Res Judicata Deprives The Sucesion Of Its Right To Due Process Contrary To Principles Many Times Enunciated By This Court

The affirmance by the Puerto Rico Supreme Court of the trial court's ruling that the 1963 proceeding was res judicata with respect to the Sucesión's claim for just compensation for the complete restriction on building within the approach zones is not only completely unsupportable but denies the Sucesión its right to a hearing in which to claim compensation for the value of the property interest thus taken by the Commonwealth. This use of the doctrine of res judicata utterly ignores the principle repeatedly upheld by this Court that deprivation of the right to a hearing constitutes a denial of due process. See, *e.g.*, *Boddie* v. *Connecticut*, 401 U.S. 371, 377-79 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969); *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U.S. 673, 678 (1930).

(3) The Holding Of The Supreme Court Of Puerto Rico On Tacit Zoning Conflicts With Principles Enunciated By This Court And With Decisions Of Numerous State Courts

In *United States* v. *Causby*, 328 U.S. 256 (1964), this Court held that "the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it." *Id.* at 264. The Court noted that the important factor is whether the intrusion impinges on "the owner's full enjoyment of the property and . . . his exploitation of it." *Id.* at 265.

Following *Causby*, numerous state courts have recognized the constitutional infirmity of zoning ordinances which prohibit or substantially restrict construction of buildings near an airport without payment of just compensation for the use of the property thus taken.[44] *E.g.*, *Peacock* v. *Sacramento County*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); *Roark* v. *Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964); *Indiana Toll Road Commission* v. *Jankovich*, 244 Ind. 574, 193 N.E. 2d 237 (1963); *Yara Engineering Corporation* v. *Newark*, 132 N.J.L. 370, 40 A.2d 559 (1945); *Ackerman* v. *Port of Seattle*, 55 Wash. 2d 400, 348 P.2d 664 (1960). See also *Chongris* v. *Corrigan*, 409 U.S. 919 (Douglas, J., dissenting) (1972). Yet in this case the Puerto Rico Supreme Court affirms the Planning Board's power to impose such restrictions and, although such restrictions were never imposed, uses the alleged building restrictions on the Sucesión's land to deny it compensation.

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[44] State cases upholding airport zoning regulations have uniformly concerned regulations which did not deprive the land owner substantially of the beneficial use of his land. *E.g.*, Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959); Waring v. Peterson, 137 So.2d 268 (Fla. App. 1962); Village of Willoughby Hills v. Corrigan, 29 Ohio St.2d 39, 278 N.E.2d 658, *cert. denied*, 409 U.S. 919 (1972).

(4) The Holding Of The Supreme Court Of Puerto Rico Sanctions The Commonwealth's Impairment Of Its Contractual Obligations, In Conflict With Decisions Of This Court

The holding of the Supreme Court of Puerto Rico disregards the Impairment of Contracts Clause of the Constitution by sanctioning the Commonwealth's breach of its obligation under the lease contract with the Sucesión to pay the full compensation stipulated in the lease contract. The Sucesión does not claim that the lease contract binds the Commonwealth not to exercise its power of eminent domain. Rather, the 1954 lease agreement between the Sucesión and the Port Authority's predecessor expressly recognized the Commonwealth's power of eminent domain but obligated the Commonwealth to compensate the Sucesión for condemned property "at its then value," an obligation no different from that imposed by the Constitution itself.[45] Nor does the Sucesión claim that the decisions of the Puerto Rican courts below have created the impairment of contract. But by failing to hold the Commonwealth to its contractual obligations, the Puerto Rico Supreme Court has ignored the decisions of this Court prohibiting a state government or the federal government from impairing the obligations of contracts between the government or a subdivision of the government and private citizens. See, *e.g.*, *Wood* v. *Lovett*, 313 U.S. 362, 369 (1941); *W.B. Worthen Company* v. *Kavanaugh*, 295 U.S. 56, 60 (1935); *Lynch* v. *United States*, 292 U.S. 571 (1934).

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[45] This Court has long held that just compensation is principally to be measured by the market value of the property taken, whenever such a market price can be established. *See e.g.*, Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973); United States v. Petty Motor Co., 327 U.S. 372, 377 (1946); United States v. Miller, 317 U.S. 369, 374 (1943).

(5) This Court Should Review This Case In Order To Ensure That Constitutional Guarantees Have The Same Meaning In Puerto Rico As In All Other Areas Subject To The Constitution

As shown above, the decision of the Supreme Court of Puerto Rico departs radically, not only from one recent decision of this Court on point, but also from a number of well-settled constitutional principles enunciated by this Court and from decisions of state courts squarely on point. The guarantees of just compensation, due process, and inviolability of contract thus mean one thing in Puerto Rico and quite another in the rest of the United States. Until 1961,[46] review of Puerto Rico's Supreme Court was available in the First Circuit as of right to ensure that the Constitution received the same interpretation in Puerto Rico as it does in the rest of the courts of the land.[47] Since that date, it has been left to this Court to see that the Constitution is followed in Puerto Rico, but this Court has not granted review of a single case from the Supreme Court of Puerto Rico.[48] This "hands-off" policy may encourage the Puerto Rico Supreme Court to construe the United States Constitution with a flavor indigenous to Puerto Rico. Yet the Constitution must be applied uniformly throughout the area in which it is applicable. Maintenance of such uniformity requires the intervention of this Court.

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[46] 28 U.S.C. § 1258, authorizing direct review by this Court of decisions of the Puerto Rico Supreme Court, was added on August 30, 1961, by Pub. L. 87-189, § 1, 75 Stat. 417.

[47] *See, e.g.*, Cementerio Buxeda, Inc. v. People of Puerto Rico, 196 F.2d 177 (1st Cir. 1952). In that case the First Circuit reversed the Supreme Court of Puerto Rico for affirming a court of eminent domain which had excluded all evidence bearing on one major component of the market value of the land condemned.

[48] Since August 30, 1961, 38 petitions for writ of certiorari and 4 appeals to this Court have originated in the Supreme Court of Puerto Rico, but none has been heard by this Court.

Puerto Rico is a commonwealth, a free state which is associated with the United States. There is no doubt about the application of the Due Process, Just Compensation and Contract Clauses to Puerto Rico.[49] Puerto Rico is rightfully proud of its own distinctive cultural, political, social and legal traditions, but these have been, and must continue to be, fitted within the broad framework of the United States Constitution. Perhaps because of its distinct traditions, physical distance from the rest of the United States and use of Spanish as an official language, there is a peculiar danger that Puerto Rican courts will arrive at interpretations of the Constitution contrary to those adopted in the rest of the territory subject to the United States Constitution.[50] In addition to damaging the

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[49] This Court has found it unnecessary to decide whether the constitutional guarantee of due process applies to Puerto Rico under the Fifth or Fourteenth Amendment. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668-69 n.5 (1974). This Court noted in that case (*id.*) that

> [t]he Joint Resolution of Congress approving the Constitution of the Commonwealth . . . subjects its government to "the applicable provisions of the Constitution of the United States," 66 Stat. 327, and "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States," *Mora* v. *Mejias*, 206 F.2d 377, 382 (CA 1 1953) (Magruder, C. J.).

Similarly, the rights to just compensation, Chicago, B. & O. R.R. Co. v. City of Chicago, 166 U.S. 226, 233, 236-37 (1897), and protection against impairment of contract, Lynch v. United States, 292 U.S. 571 (1934), have been found to be fundamental parts of due process.

[50] *See, e.g.*, Planta de Cal Hicaco v. Superior Court, Court of Eminent Domain, No. 0-74-184 (P.R. Sup. Ct., February 13, 1975). In that case, the Supreme Court of Puerto Rico also passed easily over a claim based on the federal constitutional rights of just compensation and due process of law.

In the *Planta* case the Commonwealth had initiated suit to take two small islands, but as it claimed that it already owned the islands, it deposited in court as just compensation only the token amount of $2.00. In the first phase of the case, the defendant land owner was

integrity of constitutional principles, such a tendency creates confusion and divergence in the interpretation of the Constitution of the United States as between the Supreme Court of Puerto Rico and this Court, the federal judiciary and the judiciary of the several states, thereby undermining the policies of integration between the Commonwealth and the Mainland that Congress has approved.[51] In order to prevent such divergence, this Court should grant review in this case.

(6) Substantial Rights Are Put In Jeopardy By The Puerto Rico Supreme Court's Decision

The substantive rights at stake in the decision of the Puerto Rico Supreme Court are of great importance throughout Puerto Rico and the rest of the United States. With respect to the parties to this case, the decision of the Puerto Rico Supreme Court casts a cloud of uncertainty over the value of the Sucesión's remaining land,

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eventually successful in proving title to the islands after 7 years of litigation.

The Commonwealth then deposited a sum it claimed to constitute just compensation for the property, but calculated that sum on the basis of the value of the property at the time of its initial suit when it had in effect claimed that it already owned the land and had therefore deposited only a token sum. This procedure by the Commonwealth was contrary to the clear language of 32 P.R.L.A. § 2907 (1968), by which title to land condemned passes to the Commonwealth "as soon as . . . deposit is made in the court" of a sum of money estimated to be just compensation for the land sought to be acquired. The token sum clearly did not fulfill this requirement and hence title did not pass until deposit of the second sum 7 years later. By affirming the Commonwealth's method of valuation, the Puerto Rico Supreme Court denied the land owner in that case just compensation and due process of law, much as it has denied the Sucesión those rights in the present case.

[51] Congress' policy to foster the economic development of Puerto Rico and its integration with the rest of the United States economy is well known and can be seen, for example, in the tax exemption for companies incorporated and doing business in Puerto Rico. INT. REV. CODE OF 1954, § 931.

which is adjacent to that taken for the airport in this case. Even after the expansion, it is unlikely that the Mercedita Airport will be able to accommodate the largest passenger jet airplanes. If more of the Sucesión's land is condemned in the future, will the same unusual application of res judicata lead to a drastically lower valuation of that land, even though nothing has been said in the present case to date about building restrictions over these adjacent lands? Are they too now "tacitly zoned" to prevent any new construction?

But the importance of this decision goes far beyond the interests of the Sucesión. Air transportation has become an increasingly important aspect of our national life. Airports all over the nation are in the process of expanding by the acquisition of surrounding land.[52] Puerto Rico is in the process of rapidly expanding its public works projects. In the current economic climate, most municipalities are financially hard pressed, and sympathetic courts are ever inclined to help such communities accomplish public works projects as cheaply as possible.[53] Thus there is a grave danger that the Puerto Rico Supreme Court's decision in this case will be followed in Puerto Rico and possibly in other parts of our nation. At some point this Court will have to review such a case. Moreover, unless this Court reviews this case, much irremediable harm may be done. Inasmuch as most condemnation proceedings are terminated by settlement, as was the 1963 proceeding involving the Sucesión, the

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[52] An FAA-sponsored study of 34 major U.S. airports found that "most airports in the sample intend to expand the existing site . . ." Urban Systems Research Engineering, Inc., Buy Now, Fly Later: Land Banking for Airport Development (Report No. FAA-ASP-74-1) at 68 (March, 1975).

[53] In addition to the example provided by the Puerto Rican courts in this case, see the lower court decisions in the cases cited *supra* in note 43. With the exception of the instant case, the highest state court to consider the issue has always reaffirmed the principle of *Griggs*.

great vice of the Puerto Rico Supreme Court's decision is that it provides condemnors with strong, though unconstitutional, arguments of res judicata and tacit zoning with which to force unfair settlements on condemnees in similar situations. Review of a later case will not correct negotiation abuses in the interim.

(7) This Case Invites Review Because The Issues Are Presented In Especially Clear Form

The Court reviews very few condemnation cases [54] and has directly reviewed no decisions of the Puerto Rico Supreme Court.[55] This case is an especially appropriate one for Supreme Court review because the constitutional issues are not clouded by difficult fact questions or questions peculiar to Puerto Rican law. The only non-constitutional question—whether it be regarded as a question of law, fact, or a mixed question of law and fact—is whether or not in the 1963 proceeding the Sucesión should have claimed compensation for building restrictions on its land adjacent to the land taken in that proceeding. The principal evidence bearing on this issue is contained in written documents of record—*i.e.*, the judgment terminating the 1963 proceeding, the two "nunc pro tunc" amendments to that judgment and the statement on the record during the 1968 proceeding by the trial judge, who presided over both the 1963 and the 1968 proceedings, to the effect that the 1963 proceeding placed no restrictions on the Sucesión's remaining land in the

[54] A recent study of this Court's docket shows that between 1932 and 1962 condemnation cases have never constituted more than 3% of its cases with opinion. Dunham, *Griggs* v. *Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, [1962] SUP. CT. REV. 63, 64.

[55] *See* note 48, *supra*. The last case arising out of Puerto Rico which this Court has reviewed with opinion appears to be *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), but that case arose in the Federal District Court for the District of Puerto Rico.

approach zones of the Mercedita runway. The Puerto Rican courts rely on no other evidence but hold the Sucesión constructively knowledgeable of a policy on the part of the Planning Board which was never published or otherwise proven to exist, and which, if it did exist, would be unconstitutional. The constitutional question of denial of just compensation, denial of due process, and impairment of contract are thus starkly put in issue by the decision below of the Puerto Rico Supreme Court. This Court should take the opportunity presented by this clear case to exercise its constitutional and statutory authority to settle these important points of constitutional law for Puerto Rico, and to safeguard the uniformity with which the Constitution should be applied throughout the area in which it is applicable.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
ORLANDO J. ANTONSANTI
JOHN C. REITZ

Of Counsel:

JONES, DAY, REAVIS & POGUE

May, 1976

ANNEX I

The FAA regulations define "approach and transition surfaces" and a "clear zone." The surfaces are planes that begin on the ground near the boundaries of a runway and slope up and away from the runway in order to define the space needed for maneuvering airplanes approaching the runway. The approach surfaces start at each end of the runway and intersect the plane of the runway at right angles to the long axis of the runway. The transition surfaces are along each side of the runway, and their planes intersect the plane of the runway parallel to that axis. 14 C.F.R. § 77.25 (1975).

The "runway clear zone" is the area of ground surface directly under the approach surface from the end of the runway to the point where the surface reaches a height of 50 feet above the level of the runway. 14 C.F.R. § 151.9(b) (1975). The trial court below sometimes referred to the clear zone as the "approach zone" and referred to an analogous area under the transition surface as the "transition zone."

The FAA regulations do not prohibit construction of buildings in the approach and transition zones; the approach and transition surfaces are used solely to define "obstructions to air navigation." 14 C.F.R. § 77.23(a) (1975). In order to qualify for federal aid, an airport sponsor must acquire sufficient interest in land in the clear zones to guarantee that no buildings will project above the approach surfaces. 14 C.F.R. §§ 151.9, 151.11 (1975).

Essentially the same regulations have been in force since 1962. *See* 14 C.F.R. § 550.38 (1962). Since 1964, the regulations have been almost word-for-word identical to those presently in force. *See* 14 C.F.R. §§ 17.27(b)(2)-(c), 151.9, 151.11 (1964); 14 C.F.R. §§ 77.27(c)(ii)-(d), 151.9, 151.11 (1966); 14 C.F.R. §§ 77.27(c)(2)(ii)-(d), 151.9, 151.11 (1968).

ANNEX II

PLAN OF
MERCEDITA AIRPORT
PONCE, PUERTO RICO

Based On
Defendant's Exhibit 1
Pages 21 and 22

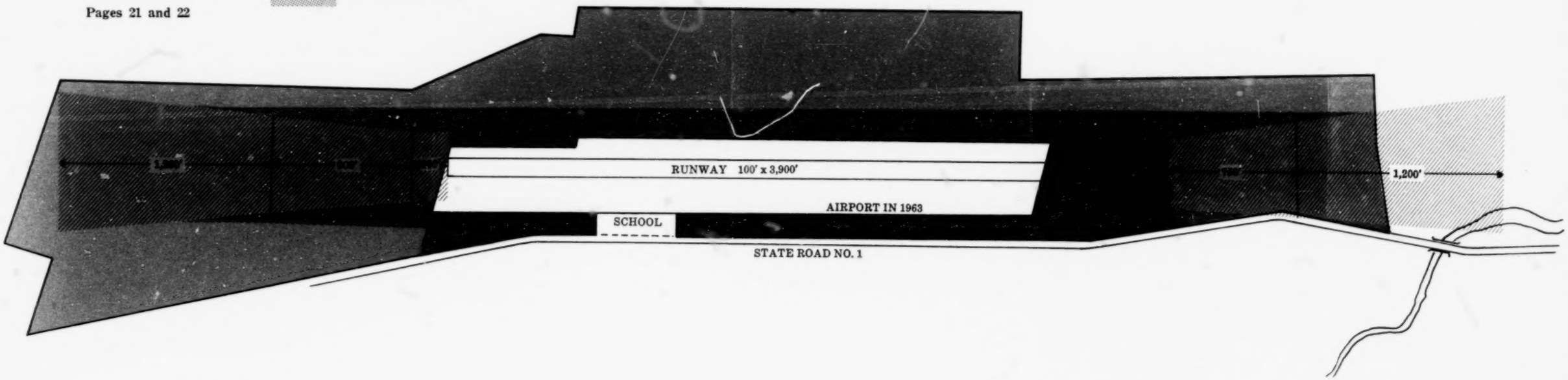
Original Airport
(Leased in 1954, reversion taken in 1963)

Additional Land in
1963 Taking

1968 Taking

Approach Area

Transition Surface



APPENDICES

APPENDIX A

IN THE SUPREME COURT OF PUERTO RICO

No. R-72-76

Commonwealth of Puerto Rico,
Plaintiff and Appellee

v.

Sociedad Civil Agrícola e Industrial Heirs of J. Serrallés, *et al.*,
Defendants and Appellants

REVIEW

Judgment of the Superior Court,
Court of Eminent Domain,
Pedro Santos Borges, Judge

San Juan, Puerto Rico, November 12, 1975

PER CURIAM: The petition which we are considering herein [1] attacks the valuation given by the Superior Court, Court of Eminent Domain, to 82.21 cuerdas of a total of 158.3973 cuerdas in the vecinity of Mercedita Airport, in Ponce, condemned by the State to enlarge the facilities of said airport. On October 17, 1968, the State consigned $856,889.00 as a just compensation for the 158.3973 cuerdas taken. The respondent Part deter-

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[1] The petition before us began as an appeal. One of our Divisions considered it as a petition for review and denied it. Appellants requested reconsideration and, pending its consideration, the appellants informed us about "serious errors discovered after judgment," and invoked Rule 49.2 of the Rules of Civil Procedure to set it aside. Having been informed that the trial court refused to set aside or modify its judgment under said Rule, we decided to reconsider and issued the writ.

mined in its judgment that the just compensation should be $1,232,963.65, and ordered the State to consign an additional sum to the one originally consigned of $371,-896.65 [2] plus interest at 6% annually on the amount beginning as of October 17, 1968.

Upon making the determination on the compensation which the State must pay, the trial court concluded that from the 158.3973 cuerdas condemned, 76.1873 cuerdas should be paid at $12,000 each, and the remaining 82.21 at $3,000. It grounded itself on the fact that the best use for the 76.1873 cuerdas is an industrial one, while the best use of the other 82.21 cuerdas is agricultural, increased by its potential to build facilities for aid to air navigation.

Appellants do not question and accept the value given to the 76.1873 cuerdas. Their petition is directed for us to review the value which as just compensation the trial court granted to the 82.21 cuerdas. Their arguments can be summarized as thus: that the court could not fractionate the condemned property for the purpose of its valuation, and that upon doing it, it departed from the stipulation in the lease contract executed in 1954 between the Puerto Rico Transportation Authority and appellants, which must be considered as the "law of the case"; that the court incorrectly applied the rules of the Federal Aviation Agency and determined that rules could be locally approved on air navigation which can be in conflict with the federal ones; that the court erred upon holding that appellants were barred, by the doctrine of res judicata, from claiming in this action for condemnation, begun in 1968, what they did not claim in another action, also on condemnation, begun in 1963; that the

[2] This result takes into consideration $4,177 which was paid for the hangar, which were deducted from appellant for belonging to the Heirs of Valdivieso, defendants in the same action for condemnation.

court erred upon holding that Mercedita Airport was tacitly zonified in 1954; and that the judgment is not supported by the evidence.

The questions raised are connected with a lease contract executed in 1954 between the Puerto Rico Transportation Authority, predecessor of the Ports Authority, and the Sociedad Civil Agrícola e Industrial Heirs of J. Serrallés, appellants herein.[3] On that date, appellants operated a runway or private airport on lands belonging to them in the vecinity of Central Mercedita in Ponce. By virtue of the aforesaid lease contract, the airport passed to the jurisdiction of the Transportation Authority. The contract in its fourth clause provided:

> "In the event 'lessee' or the Commonwealth of Puerto Rico requires condemnation of additional adjacent lands for airport purposes, 'lessee', or the Commonwealth, shall, as part of such condemnation, condemn the leased premises. In condemnation of the leased premises the valuation shall not include any added value which the improvements or buildings constructed by 'lessee' may have given to said premises, but the fact of the former use and value of said premises as a private airport as well as the best available use to which said lands may be put, except as a commercial airport, shall be considered as a factor in its valuation.
>
> "Any additional land that may be required by the 'lessee' or by the Commonwealth if condemned by eminent domain proceedings or otherwise shall be compensated for at its then value, unless an agreement as to such value at such time is arrived at between the parties."

In 1963, the State condemned 27.807 cuerdas from appellants which included the premises occupied by Mer-

[3] Said contract was presented as evidence by the appellants in the hearing held by the respondent court upon considering the motion under Rule 49.2, to which we referred in footnote 1.

cedita Airport and three adjacent lots, which were used to enlarge the existing runway and to improve other facilities of the airport. The compensation which finally was granted in the first suit was fixed according to a stipulation of the parties. Upon approving it, the court stated:

> "The Court, after weighing the large heap of evidence presented by both parties as a whole, gives its approval to the transaction agreed upon, principally taking into consideration, among many other factors, that the property should have been assessed as a global unit, as it was finally concluded in the conversations had in Court, and that the agreement between the parties should have been followed when the lease contract, which appears of record, was perfected, in relation to the best available use to be considered upon making the valuation of the property leased or of any other acquired by condemnation proceedings. The method finally used to attain this transaction and which this Court approves is the correct method, since what was indicated in the contract as to this point constitutes the law of the case, which should have been followed from the beginning."

Now appellants assign that the court erred, according to those statements, in the case that gave rise to the present appeal, in stating that the court could not fractionate the condemned property upon valuating it, nor prescind from the clause of the lease contract insofar as it compelled to fix the compensation according to the best available use to which the lands may be devoted.

We do not believe that the phrase "that the property should have been assessed as a global unit" stated in the 1963 judgment of the case has the scope of preventing that different valuations by lots be made in the 1968 case, based on their proximity to the airport and to the best available use to which they may be devoted. That was

precisely the criterion which the contracting parties set forth in the fourth clause of the contract, copied above. It should be noted that that best available use, if the criterion outlined in the contract is to be followed, could not take into consideration the use of the premises "as a commercial airport." The fourth clause says thus.

When, as in the case at bar, a lot of more than 150 cuerdas is involved, some farther than the others from the restricted airport zone, and which can be easily separated into sections according to the best available use to which each section may be devoted, the method of valuation on the basis of sections or portions is justified and convenient. This method was accepted as good in *People* v. *Heirs of Quiñones*, 71 P.R.R. 242, 245 (1950), and we see no reason to reject it. IV Nichols, *On Eminent Domain*, sec. 12-314, says on that particular:

> "Where different segments of a parcel are susceptible of valuation on the basis of differing highest and best uses, it is error to attribute an overall or average unit of value to the entire parcel."

See also, *Frontier Town Properties, Inc.* v. *State*, 296 N.Y.S.2d 90 (1968); *Fonda, J. & G. R. Co.* v. *State*, 287 N.Y.S.2d 134, (1968); *Evans* v. *State*, 285 N.Y.S.2d 626 (1967).

The lease contract, so much emphasized by appellants, if binding for the purposes of the condemnation under consideration, does not bar the use of the method of the division of the lot for the purposes of its valuation. The restrictions to the power of the State in the matter of condemnation of private property for public use are not presumed. The power of eminent domain is inherent in the sovereign power of the State and as such is inalienable and cannot be bargained away. I Nichols, *On Eminent Domain* sec. 1-13(4); sec. 1.141 Sup. 1973, Jahr, *Eminent Domain*, at 3-4. The only restriction of the State is to pay "a just compensation" and to act "accord-

ing to the manner provided by law." Constitution of the Commonwealth of Puerto Rico, Art. II, Sec. 9.

It is inescapable that the land which is closer to the runway, particularly in its extensions for the landing and the take-off of airplanes is much more limited than the more distant ones. In the first, the construction of buildings is unacceptable from the point of view of the security of air navigation. On the sides, the constructions must comply with height restrictions, also in obedience to security. Those considerations, far from being arbitrary, are reasonable when the best available use to which the lands may be devoted, is determined. The respondent court, in the exercise of its sound discretion, considered that the 76.1873 cuerdas, which are more distant from the restricted zones, have an industrial potential as the best available use, and valued them at $12,000 per cuerda. The 82.21 cuerdas close to the runway, are so limited because of their closeness to it, that their best available use cannot be other than agricultural, increased by their potential for the building of facilities for the aid of the air navigation, and determined its value at $3,000 per cuerda. Those determinations, because a specialized court is involved, deserve special deference, specially in a case like the one at bar, of abundant evidence, and in which the court's judgment in its 47 pages, shows a careful and thoughtful consideration of all the factors involved.

The contentions relative to the application of federal regulations, to the doctrine of res judicata, and to the alleged tacit zoning of the Mercedita Airport are frivolous. Contrary to what appellants argue, the trial court did not conclude that in Puerto Rico regulations which are in conflict with the federal ones may be approved. The trial court limited itself to explain the relation between the different regulatory provisions. The fact that the federal regulations establish height limitations does not exclude the Planning Board's power to grant or deny

construction permits in airport zones. And the fact that an express zoning of Mercedita Airport was not made does not bar the acknowledgment of restrictions for the benefit of public security.

The respondent court concluded that the claim for damages on account of the segregation made by appellants constitutes res judicata in the 1963 suit. It is correct. In that suit between the same parties, and stemming from the same matter as the 1968 one, the defendant, appellant herein, did not claim such damages. A final and unappealable judgment as that of the case of 1963, constitutes res judicata not only in relation to the questions raised, but also in relation to those that could have been raised. *Mercado Riera* v. *Mercado Riera*, 100 P.R.R. 939 (1972); *Isaac Sánchez* v. *Universal C.I.T. Credit*, 95 P.R.R. 361 (1967); *Capó Sánchez* v. *Secretary of the Treas.*, 92 P.R.R. 817 (1965); *Riera* v. *Pizá*, 85 P.R.R. 256 (1962).

The last contention—that the judgment is not supported on the evidence—is not specifically discussed by appellants. A reading of the findings made by the trial court, that enters into numerous details as to the evidence, demonstrates its careful weighing of the same.

The judgment of the trial court will be affirmed.

IN THE SUPREME COURT OF PUERTO RICO

No. R-72-76

Commonwealth of Puerto Rico,
Plaintiff and Appellee

v.

Sociedad Civil Agrícola e Industrial Heirs of
J. Serrallés, *et al.*,
Defendants and Appellants

REVIEW

JUDGMENT

San Juan, Puerto Rico, November 12, 1975

For the reasons stated in the foregoing per curiam opinion, the judgment of the trial court is affirmed.

It was so decreed and ordered by the Court and certified by the Chief Clerk. Mr. Chief Justice Trías Monge disqualified himself and Mr. Justice Dávila took no part in the decision of this case.

ANGEL G. HERMIDA
Chief Clerk

APPENDIX B

IN THE SUPREME COURT OF PUERTO RICO

No. R-72-76

Commonwealth of Puerto Rico,
Plaintiff and Appellee

v.

Sociedad Civil Agrícola e Industrial Heirs of
J. Serrallés, *et al.*,
Defendants and Appellants

REVIEW

ORDER

San Juan, Puerto Rico, December 17, 1975

The foregoing motion for reconsideration is hereby denied. By virtue of the foregoing, the petition for hearing is academic.

It was so agreed by the Court and certified by the Chief Clerk.

ANGEL G. HERMIDA
Chief Clerk

APPENDIX C

CHIEF CLERK'S CERTIFICATE

I, Angel G. Hermida, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the foregoing is a true and faithful photostatic copy of the official translation from Spanish into English (said official translation having been made under the authority of Act No. 87 of May 31, 1972) of the Opinion and Judgment rendered by the Supreme Court of Puerto Rico on November 12, 1975, and the Order entered on December 17, 1975, in the above-entitled case (R-72-76), the original of which, in Spanish, is under my custody in this office.

IN WITNESS WHEREOF, and at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court, at San Juan, Puerto Rico, this 23 day of February 1976.

/s/ A. G. Hermida
ANGEL G. HERMIDA
Chief Clerk
Supreme Court of Puerto Rico

JUL 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1649

~~75-1646~~

SOCIEDAD CIVIL AGRICOLA E INDUSTRIAL SUCESION J. SERRALLES, *Petitioner,*

v.

COMMONWEALTH OF PUERTO RICO, *Respondent.*

On Appeal from the United States District Court for the District Court of Puerto Rico

---

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1649

SOCIEDAD CIVIL AGRICOLA E INDUSTRIAL SUCESION J. SERRALLES, *Petitioner,*

v.

COMMONWEALTH OF PUERTO RICO, *Respondent.*

On Appeal from the United States District Court for the District Court of Puerto Rico

---

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE COURT:

Comes now respondent through its undersigned attorneys and respectfully requests that the Writ of Certiorari requested by Petitioner be denied.

PROCEDURAL BACKGROUND

The facts of this case as to the procedural background before the Commonwealth of Puerto Rico Courts, as stated by Petitioner in its Petition for Writ of Certiorari are correct and in order to avoid repetition we adopt them herein.

STATEMENT OF THE CASE

Pursuant to its powers of eminent domain, on October 17, 1968, the government of the Commonwealth of Puerto Rico initiated a condemnation proceeding against some lands belonging to petitioner, in the Superior Court of Puerto Rico, Court of Eminent Domain. On that same date, the Commonwealth consigned the sum of $856,889.00 as fair compensation for the 158.3973 "cuerdas"[1] taken. After extensive hearings held before said court, it determined on October 15, 1971 that the fair compensation for those lands should be $1,232,963.65 and ordered the Commonwealth to consign an additional sum of $371,896.65 to the one originally consigned, plus interest at 6 percent annually on the amount, beginning as of October 17, 1968, which was done. As the basis for this determination the Superior Court took into consideration all the evidence submitted by the parties, and issued a very detailed judgment stating the reasons for its conclusions.[2] The Court of Eminent Domain concluded that of the 158.3973 "cuerdas" taken, 76.1873 "cuerdas" should be paid at $12,000 each, and the remaining 82.21 at $3,000. Its basis for this determination was the fact that the best use for the 76.1873 "cuerdas", is an industrial one, while the best use for the other 82.21 "cuerdas" is agricultural, increased by its potential to build facilities for aid to air navigation. Petitioners did not question, and accepted the value gives to the 76.1873 cuerdas, and appealed to the Supreme Court of Puerto Rico to review the value which as first compensation the trial

[1] A "cuerda" is a measure of land consisting of 43,290 square feet, which is less than 1% smaller than an acre.

[2] Petitioner has informed us that he will submit to this Court a certified copy of a translation of this judgment.

court granted to the remaining 82.21 cuerdas. Through a Per Curiam Opinion dated November 12, 1975,[3] the Supreme Court of Puerto Rico affirmed the judgment of the Superior Court. It is from this judgment that petitioners seek review through writ of certiorari from this Court.

Since the 1963 taking is not an issue before this Court, we will refer to it in the discussion of the reasons for denying the writ, as to those points where it is relevant.

JURISDICTION

The jurisdiction of this Court was invoked under 28 U.S.C. Sec. 1258 (3).

Said statute states that:

"Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

(1) ----------

(2) ----------

(3) By writ of certiorari, where the validity of a treaty as statute of the United States is drawn in question or when the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of or commission

[3] Appendix A of the Petition.

held or authority exercised under, the United States."

The present form was given to said statute in 1961 in order to eliminate the right to appeal from the Supreme Court of the Commonwealth of Puerto Rico to the Court of Appeals for the First Circuit and to provide that final judgments and decrees entered by the Supreme Court of Puerto Rico shall be reviewed instead by the Supreme Court of the United States.

The Judicial Conference and the Department of Justice supported the passage of this legislation, recognizing that in cases involving a non-Federal question, the Court of Appeals for the First Circuit would not reverse the Supreme Court of Puerto Rico unless the decision is "inescapably wrong" or "patently erroneous". *1961 U.S. Code Congressional and Administrative News,* page 2449.

It has been held repeatedly that the Supreme Court of Puerto Rico should not be reversed in a matter of local law unless the court's determination is "inescapably wrong" or "patently erroneous". *Sancho Bonet* v. *Texas Co.,* 308 U.S. 463 (1940); *De Castro* v. *Board of Commissioners,* 322 U.S. 451 (1944); *C. Brewer P.R.* v. *Corchado,* 303 F.2d 654 (1962); *Acosta-Marrero* v. *Commonwealth of Puerto Rico,* 275 F.2d 294 (1960); *Fullana Corp.* v. *P.R. Planning Board,* 257 F.2d 355 (1958); *Marquez* v. *Avilés,* 252 F.2d 715 (1958); *Iglesias Acosta* v. *Secretary of Finance of P.R.,* 220 F.2d 651 (1955); *Sagastivelza* v. *P.R. Ins.,* 171 F.2d 563 (1949); *Compose* v. *Central Cambalache, Inc.,* 157 F.2d 43 (1946). *This Court* stated in *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41 (1970) that:

> "The relations of the federal courts to Puerto Rico have raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal Courts, were inclined to construe Puerto Rican Laws in the Anglo-saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be 'inescapably wrong'. See Bonet v. Texas, Co., 308 U.S. 463, 471."

In order to properly invoke the jurisdiction of this Court, petitioners must present a substantial federal question, not merely a frivolous or colorable one.[4] "It is not enough that a federal question be lurking in the record". *Ramos* v. *Leahy,* 111 F.2d 955 (1940). In the case at bar, notwithstanding petitioner's allegations, the sole question before this Court is whether the appraisal of the 82.21 "cuerdas" at $3,000.00 each was reasonable. We respectfully submit, on the basis of the whole record of the case, that this clearly fails to constitute the federal question upon which this Court would have jurisdiction pursuant to 28 U.S.C. 1258(3), and that Certiorari should be denied for lack of jurisdiction. Nonetheless we intend to show that the Commonwealth courts not only were not "inescapably wrong" or "patently erroneous" but gave the lands in question a reasonable value.

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[4] See: *Prensa Insular de P.R.* v. *People of P.R.,* 189 F.2d 1019 (1951); *Mercado* v. *Lluberas Pasarell,* 225 F.2d 715, cert. den. 350 U.S. 936.

REASONS FOR DENYING THE WRIT

In this section we shall discuss each of the arguments expounded by petitioner as to why the writ should be issued. They deal with the circumstances considered and the criteria used by the Commonwealth Courts in determining the value of the land taken.

(1) The Decision of the Supreme Court of Puerto Rico Does Not Conflict with This Court's Decision in Griggs v. Allegheny County.

Petitioner avers that the decision of the Supreme Court of Puerto Rico conflicts with this Court's decision in *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962). This case is completely different from the case at bar. In *Griggs* the defendant county designed its plan for an airport, in compliance with federal requirements. Allowable costs payable by the federal government included costs of acquiring land or easements through airspace. The noise, vibrations, and fear caused to the occupants of plaintiff's residential property located near a runway of the airport by constant and extremely low overflights interferred with the use of the owner's property. This Court held that (1) the interference with the plaintiff's property amounted to a "taking" in the constitutional sense of an air easement, for which compensation must be made; and (2) the defendant county, and not the United States, was the "taker" liable to pay the compensation.

In the case at bar, petitioner admits in its brief[5] that "neither party argues that there has been a taking of a navigational easement through overflights. . ." Yet it states that ". . . the effect of the decision of the Puerto Rico Supreme Court is to enable the Common-

[5] Page 18 of Petition.

wealth to obtain without cost an absolute prohibition on any and all building on the land within the approach zone". This assertion lacks any factual basis. As petitioner has stated in his brief[6] the landing strip of the Mercedita Airport was built by the Sucesión and leased in 1954 to the Commonwealth, so that the Puerto Rico Transportation Authority would operate the landing strip as a commercial airport. The lease contract provided that in the event that the Commonwealth desired to condemn additional adjacent lands for airport purposes, it would pay compensation for the land at its then current market value. On December 27, 1963, the Commonwealth instituted condemnation proceedings, through which it acquired the title in fee simple to the area it had leased and to additional surrounding land owned by the Sucesión. The 1968 taking was initiated with respect to 158.3973 "cuerdas" of the Sucesion's land adjacent to the expanded Mercedita Airport, for further expansion. A portion of this land nearest to the landing strip, 82.21 "cuerdas", lay within the "approach" or "clear" zones associated with the ends of the runway and the "transition" zones associated with the sides of the runway, as defined by the Federal Aviation Administration.[7]

In other words, the land taken—and paid for—in the 1963 and 1968 condemnations included that over which the superadjacent airspace at low altitude is so close to the land, that the use of the airport constitutes the use of the land surface itself.[8] There is no showing, or proof in the record, that the landing strip is so close

[6] Pages 4, et seq. of Petition.

[7] See page 6 of Petition, and Petitioner's Anex II.

[8] *Nichols on Eminent Domain*, Sec. 5.781.

to petitioner's land so as to constitute an invasion of the "superadjacent airspace that will affect the use of the surface of the land itself". *U.S.* v. *Causby,* 328 U.S. 256. On the contrary, it is evident that this additional land was taken in order to cover the "approach" and "clear" zones, and that this is no factual taking of petitioner's land. Low flights, in and of themselves, do not constitute the basis of a cause of action, but they must be coupled with a resulting substantial interference with the use and enjoyment of the property affected.[9] In any event, it is now firmly established that the upper reaches of the atmosphere are in the public domain and that the surface owner's title, if any, is subject to the right of public passage.[10]

In order to apply the *Grigg's* doctrine. there must be a clear showing that the noise, vibrations, and fear caused to the occupants of a property near an airport by constant and extremely low over flights interfere with the use of the owner's property so as to amount to a "taking "of an air easement for which compensation must be made. There has been no such showing, or any proof leading to such a conclusion in the case at bar.

Furthermore, and of utmost importance, we have to remember that the airport was built by petitioners themselves, so that any impact on adjoining land—in this case, petitioners' own land—must have been taken into account when they built the landing strip. This use was reaffirmed when in 1954 they leased the landing strip to the Commonwealth for use as a commercial

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[9] *Id.*

[10] *U.S.* v. *Causby, supra; Freeman* v. *U.S.*, 167 F.Supp. 541; *U.S.* v. *One Pitcairn Biplane,* 11 F.Supp. 24.

airport. The 1963 case was concluded by a judgment approving a stipulation of the parties arrived at in open court. In conclusion, not only there has been no "taking" of petitioner's land through an easement, but had the situation in the case at bar been similar to that of *Griggs,* petitioners would be estopped from claiming any damages under this case's doctrine.

(2) The Puerto Rico Supreme Court's Holding on Res Judicata Did Not Deprive the Sucesion of Its Rights to Due Process.

Article 1204 of the Civil Code of Puerto Rico—31 L.P.R.A. 3343—in its pertinent part, states that:

> "In order that the presumption of the res judicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such."

These three elements appear in the 1963 and 1968 cases: (1) There is perfect identity between the things since in 1963 the Commonwealth acquired the right to enjoy a "clear" and "transition" zone to continue operating the airport. (2) There is perfect identity between the causes since in 1963 the petitioner could have claimed damages for the limitations are the adjoining lands; and (3) there is perfect identity between the parties—the Sucesion and the Commonwealth. In upholding the Superior Court's conclusion as to *res judicata* the Supreme Court of Puerto Rico held in its November 12, 1975 opinion in the case at bar, clearly solving this argument, that:

> "The contentions relative to the application of federal regulations, to the doctrine of res judicata,

and to the alleged tacit zoning of the Mercedita Airport are frivolous. Contrary to what appellants argue, the trial court did not conclude that in Puerto Rico regulations which are in conflict with the federal ones may be approved. The trial court limited itself to explain the relation between the different regulatory provisions. The fact that the federal regulations establish height limitations does not exclude the planning Board's power to grant or deny construction permits in airport zones. And the fact that an express zoning of the Mercedita Airport was not made does not bar acknowledgement of restrictions for the benefit of public security.

The respondent court conclude that the claim for damages on account of the segregation made by appellants constitutes res judicata in the 1963 suit. It is correct. In that suit between the same parties, and stemming from the same matter as the 1968 one, the defendant, appellant herein, did not claim such damages. A final and unappealable judgment as that of the case of 1963, constitutes res judicata not only in relations to the questions raised, but also in relation to those that could have been raised. *Mercado Riera* v. *Mercoda Riera,* 100 P.R.R. 939 (1972); *Isaac Sànchez* v. *Universal C.I.T. Credit,* 95 P.R.R. 361 (1967); *Capó Sànchez* v. *Secretary of the Treas.,* 92 P.R.R. 817 (1965); *Riera* v. *Pizà,* 85 P.R.R. 256 (1962)."

To constitute a taking of property without due process by force or judgment in condemnation proceedings, the error must be gross and obvious, coming close to the boundary of arbitrary action. *Roberts* v. *City of New York,* 295 U.S. 264. The equal protection clause does not exact uniformity of condemnation procedure nor does this clause guarantee any particular form thereof. *Cahill* v. *Cedar County,* 367 F.Supp. 39 (1973),

affd. 419 U.S. 806. It may be said in a general way that the due process clause was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. Due process require a taking for public use, and compensation.[11] From the procedural point of view, the essential elements of due process require that there be notice and opportunity to be heard, before a competent tribunal, in an orderly proceeding.[12] Matters of procedure are subject to legislative regulation provided that the essential elements of due process are preserved.[13]

From the whole record it is obvious that petitioner at all times has been secured its right of due process, and furthermore, that the Commonwealth courts acted correctly in holding that this point was res judicata. "Due process of law does not mean infallible process of law." (Learned Hand, J.) *Schechtman* v. *Foster,* 172 F.2d 339 (1949).

(3) The Holding of the Supreme Court of Puerto Rico as to Zoning Does Not Violate Petitioner's Rights.

According to the facts stated in section (1), *supra,* this is not a situation like that of *U.S.* v. *Causby, supra,* or *Griggs* v. *Allegheny County, supra;* we are not dealing with an fringement in the government's part on petitioner's property rights, but rather with limitations on property rights imposed by petitioner on itself when it decided to build the landing strip and afterwards to rent it as commercial airport. The so called "tacit

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[11] Nichols On Eminent Domain, Secs. 4.7 and 4.8.

[12] Id., Sec. 4.10.

[13] Id., Sec. 4.102.

zoning" which petitioner mentions, are actually the restrictions imposed by the regulations[14] of the Federal Aviation Agency, which require the "clear" and "transition" areas we have referred to before, and the restriction imposed on areas surrounding airports by the Planning Board of Puerto Rico.[15]

Any person who wants to operate an airport must comply with federal and local regulations. When before 1954, petitioner began to operate the landing strip, there was no question as to the building restrictions imposed on their adjoining land by said operation; these were self-imposed and would affect the adjoining land irregardless of the ownership of the airport or the adjoining land. When in 1954 the airport was leased to the Commonwealth for use as a commercial airport, there was no doubt as to their applicability. So, when in 1963 the airport was taken—at a price agreed to by both parties—it was taken with all its appurtenances, accessions rights and interests belonging to the previous owners. At no time during which the airport was operated by the Sucesión, now when they rented it to the Commonwealth, nor after the Commonwealth acquired it, did petitioner resort to the planning Board of Puerto Rico to request any permits on the lands restricted by the height limitations imposed by the F.A.A. and Planning Board regulations. Furthermore, petitioner failed to raise this point during the 1963 condemnation, for which reason as we have stated before, it became res judicata.

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[14] Part 77 of F.A.A. Regulations.

[15] Articles 90, 91, 92 of Regulations 4 of the Planning Board of Puerto Rico.

Legislative and administrative action which affects property values without any discrimination of the owner's right of use do not constitute a "taking" within the purview of the Fourteenth Amendment. *Chacon* v. *Granata,* 515 F.2d 922 (1975); *Sayre* v. *City of Cleveland,* 493 F.2d 64 (1974); *Woodland Market Realty Co.* v. *City of Cleveland,* 426 F.2d 955 (1970); *23 Tracts of Land, etc.* v. *United States,* 177 F.2d 967, 969-970 (1949). Alteration of a neighborhood by condemnation proceedings does not give rise to a claim for depreciation in value of surrounding property. *Foster* v. *Harley,* 491 F.2d 174 (1974).

In the matter before us, the building limitations—and the ensuing reduction in value—were caused by the public need to regulate areas adjoining airports; this was done by petitioner himself when he built the airport.

We should note that this point refers exclusively to the valuation given to the land immediately adjoining the beginning of the landing strip; there is no issue as to whether these legal restrictions have affected petitioner's remaining land.

In conclusion, there has been no so-called "tacit zoning", but rather, lawful building restrictions arising from Federal and Commonwealth regulations, imposed on the land in question by petitioner's conduct in building the airport, using it, renting it, and not starting any action as to it after the 1963 taking.

(4) The Holding of the Supreme Court of Puerto Rico Does Not Sanction the Commonwealth's Impairment of Its Contractual Obligations.

Petitioner fails to state what the so-called impairment of contractual obligations consists of, and even

fails to provide this Court with a copy of the contract in question or to quote the pertinent clauses. On the other hand, petitioner itself admits that "The Sucesion does not claim that the lease contract binds the Commonwealth not to exercise its power of eminent domain", and further: ". . . the 1954 lease agreement . . . expressly recognized the Commonwealth's power of eminent domain. . ."; also: "Nor does the Sucesion claim that the decisions of the Puerto Rican courts below have created the impairment of contract."[16]

The pertinent clause of the contract in question reads as follows:[17]

> "In the event 'lessee' or the Commonwealth of Puerto Rico requires condemnation of additional adjacent lands for airport purposes, 'lessee', or the Commonwealth, shall, as part of such condemnation, condemn the leased premises. In condemnation of the leased premises the valuation shall not include any added value which the improvements as buildings constructed by 'lessee' may have given to said premises, but the fact of the former use and value of said premises as a private airport as well as the best available use to which said lands may be put, except as a commercial airport, shall be considered as a factor in its valuation.
>
> Any additional land that may be required by the 'lessee' or by the Commonwealth if condemned by eminent domain proceedings or otherwise shall be compensated at its then value, unless an agreement as to such value at such time is arrived at between the parties."

[16] Page 21 of the Petition.

[17] Quoted from the translation appearing on page 3a of Petition's appendix.

It is clear that the Commonwealth obligation, as arising from this contract, was to pay the "then value" or market value of any land taken. This was done.[18] In doing so, the Commonwealth courts used the prevailing criteria to determine the land's value. This contract, if binding for the purposes of the condemnation, does not bar the methods used for the valuation of the lot. It is clear from the record that the value given to the land in question was the most reasonable and corresponded to its market value. Petitioner's assertion that the Supreme Court of Puerto Rico failed to hold "the Commonwealth to its contractual obligations" is totally lacking any factual basis in the record. The Commonwealth's obligation was to pay the fair market value of the land at the time of the taking, not to pay—as petitioner contends—the same price per acre for all the land. In giving different values to different parts of the land taken, the courts below into consideration the following principle enunciated by *Nichols*.[19]

> "Exceptional circumstances will modify the most carefully guarded rule; but as a general rule it may be stated that compensation to the owner is to be computed with reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. Where different segments of a parcel are susceptible of valuation on the basis of differing highest and best uses, it is error to attribute an overall or average unit of value to the entire parcel". (Footnotes omitted).

[18] For the sake of brevity, and since this is the bulk of the 47 page judgment of the Superior Court, we shall not go into detail into the specific criteria used for the valuation.

[19] *Nichols On Eminent Domain*, Sec. 12.314.

Following this well settled principle, the courts below valued the land in question according to the highest and best use that could be given to each part of it after taking into consideration those elements that prevented the whole lot from being classified as one of an uniform or homogeneous nature. For this reason a higher value was given to the land farther from the runway, since that closer to it, particularly in its extensions for the landing and take-off of airplanes, is much more limited in use, not only from a practical point of view, but pursuant to Federal and Commonwealth regulations which arose from a situation independent of the condemnation itself, that is, from petitioner's construction of the airport.

In conclusion, not only has there been no impairment of contractual obligations, but there has been a full compliance with said obligation to pay the reasonable market value of the land taken.

(5) There Is No Basis Whatsoever To Review This Case, Nor Are There Substantial Rights in Jeopardy.

In the section on jurisdiction of this brief we have dealt with the reasons why we understand that there is no jurisdiction for review pursuant to 28 U.S.C. sec. 1258 (3). Nevertheless, we deem it necessary to comment on one of petitioner's arguments, that is: "This 'hands-off' policy may encourage the Puerto Rico Supreme Court to construe the United States Constitution with a flavor indigenous to Puerto Rico". In this case we are not dealing with the construction of the United States Constitution, or of any federal statutes, but with a matter of purely local law, such as is the appraisal of real property for eminent domain purposes. There has been no showing that in any step of

this complex and highly technical litigation, petitioners have been deprived of any federally protected rights; quite on the contrary, from the record of the case it is self-evident that they have been granted all procedural protection and that they have been paid adequately for the land taken. As to the "indigenous flavor", what this Court stated in *Fornaris* v. *Ridge Tool Co.,* is sufficient to dispose of that argument. Constitutional privileges in Puerto Rico are more than amply protected locally by the United States Constitution and the Constitution of Puerto Rico. It is patently frivolous to make this kind of assertion when there is no basis in the record of the instant case, for concluding that there has been any deprivation of federally protected rights and when, on the contrary, this Court has not deemed it necessary in fifteen years to hear any cases arising from the Supreme Court of Puerto Rico.[20]

Finally, petitioner states that "... the decision of the Puerto Rico Supreme Court cast a cloud of uncertainty over the value of the Sucesion's remaining land, which is adjacent to that taken for the airport in this case". This "danger" is hypothetic and highly speculative, and is hardly the case on controversy that would be given consideration in any court, particularly in view of the procedural safeguards available to petitioner, and considering the doctrine of *Chacon* v. *Granata, supra.* Not only there is no such "danger", but even if there were, this is not the case or time in which to deal with it.

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[20] See footnote 48 of the Petition.

CONCLUSION

This case is one purely of local law and of appraisal of land, and there is no federal question involved. For the foregoing reasons certiorari should be denied.

Respectfully submitted.

San Juan, Puerto Rico, this 16th day of July, 1976.

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